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The Exception Swallows the Rule: Market Conditions as a Factor Other Than Sex in Title VII Disparate Impact Litigation

Judith A. Pauley
West Virginia University College of Law

THE EXCEPTION SWALLOWS THE RULE: MARKET CONDITIONS AS A "FACTOR OTHER THAN SEX" IN TITLE VII DISPARATE IMPACT LITIGATION

JUDITH ANNE PAULEY*

I. INTRODUCTION

In 1960, only a little more than twenty-three million women (thirty-eight percent of the female population) were in the labor force. Today, there are more than twice as many women working and the labor force participation rate has risen to fifty-three percent.[1] Along with this increase in the number of working women have come far-reaching social changes. Structural changes in the type of work women perform, however, is lagging behind, as are earnings for women. Although women accounted for forty-three percent of all workers in 1981, the average woman earns only fifty-nine percent of the average man's earnings.[2]

There are numerous discriminatory and nondiscriminatory reasons for this wage disparity. The line between the two is often a fine one. Leading the list of reasons for the wage differential is the undervaluation of women's work. The majority of working women continue to be concentrated in low paying, dead-end jobs. Although much less severely than in the past, women are socialized to work in segregated, traditionally female-held occupations.[3] A great number of women are holding jobs in the service field in positions as secretaries, cashiers, nurses and teachers. Correspondingly, those occupations with a high percentage of female employees tend to have low average hourly earnings.[4] For example, although the textile products industry ranks first in female employment (81.9% of employees are women), it ranks fiftieth in average hourly earnings. The bituminous coal and lignite mining industry, on the other hand, ranks fifty-second in percentage of women employees (only 5.1%) but is first in average hourly earnings.[5]

The law of supply and demand is a theory often used to explain the relationship between earnings and occupation concentration. With the supply of women seeking traditionally female jobs exceeding demand, employers need

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* J.D. 1983, West Virginia University College of Law; Associate, King, Betts & Allen, Charleston, W. Va.

[1] WOMEN'S BUREAU, OFFICE OF THE SECRETARY, U.S. DEP'T OF LABOR, Report No. 673, THE FEMALE-MALE EARNINGS GAP: A REVIEW OF EMPLOYMENT AND EARNINGS ISSUES, 1 (1982).

[2] WOMEN'S BUREAU, OFFICE OF THE SECRETARY, U.S. DEP'T OF LABOR, FACTS ON WOMEN WORKERS, 1 (1982) [hereinafter cited as FACTS ON WOMEN WORKERS].

[3] Statistics show that women were 80% of all clerical workers in 1981 but only 6% of all craft workers; 62% of all service workers but only 45% of all professional and technical workers, and 63% of all retail sales workers but only 28% of all nonfarm managers and administrators. *Id.* at 2.

[4] WOMEN'S BUREAU, *supra* note 1, at 2.

[5] *Id.*

not pay women wages equal to those in male-dominated fields.[6] Employers are assured of finding women to work for whatever wages they care to offer. Because men need not seek lower paying jobs, the competition for higher paying positions increases, compounding job segregation.[7] This occupational segregation is not likely to end with legislation to protect women so long as social attitudes remain which limit a woman's prospects of employment.

Although it was once believed that another factor contributing to the undervaluation of women's work was that women, on the average, were less well-educated than men, this is no longer true. Today, the average woman worker is as well-educated as the average male worker. In March 1981 both had completed a median of 12.7 years of schooling.[8] This recent increase in education, however, appears to be doing women little good. More education does not necessarily mean greater earnings. Women workers with four or more years of college education had about the same income as men who had only one to three years of high school—$12,085 and $11,936, respectively, in 1981. When employed full-time year round, women high school graduates (with no college) had about the same income on the average as fully employed men who had not completed elementary school—$12,332 and $12,866, respectively.[9] As a group, working and nonworking women need to increase their education level, triggering a higher value assessment of their worth in the labor market.

The discontinuous worklives of women has also been thought to contribute to their low paying jobs. This factor may be changing somewhat as young women are no longer expected to marry early and devote most of their lives to raising a family. Many young people are postponing marriage, families have become smaller, and many young mothers are continuing to work. Thus, a much larger proportion of young women are gaining more years of work experience than in the past and fewer young women are interrupting their worklives.

Unionization of women's jobs would no doubt narrow the earnings gap somewhat. Only about fifteen percent of all women workers are members of unions, considerably less than their proportion of the labor force.[10] The earnings of employed women represented by labor organizations in May 1977 exceeded those of "unorganized" women in all industries and occupations by thirty percent.[11] Just as in the general work force, however, the usual weekly

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[6] Bergman, *Occupational Segregation: Wages and Profits When Employers Discriminate by Race or Sex*, 1 E. ECON. J. 103-10 (1975).

[7] U.S. Dep't of Labor Bull., Working Women: A Databook (1982).

[8] FACTS ON WOMEN WORKERS, *supra* note 2, at 2.

[9] *Id.*

[10] WOMEN'S BUREAU, OFFICE OF THE SECRETARY, U.S. DEP'T OF LABOR, WOMEN IN THE LABOR MOVEMENT, at 1 (1980).

[11] *Id.*

earnings of organized men also exceeded those of organized women, indicating unionization of women is not going to eliminate the earnings gap.

Nondiscriminatory factors contributing to the wage disparity have been studied. When characteristics of individual workers such as age, years of schooling and labor force experience are studied, the estimated female-male wage gap is reduced by about seven percentage points.[12] This leaves a thirty-four percent differential that cannot be explained by neutral factors.

The concentration of women in segregated, low paying jobs is not entirely the result of a woman's socialization. "Female jobs" are often the result of union efforts to assure that "men's jobs" are protected from competition. As protective legislation for women and children laborers was introduced, unions were no longer interested in protective legislation for all workers.[13] These restrictions on the employment of women rendered women less desirable as employees. At union insistence, women were limited to non-essential jobs (which constituted "light" work) leaving the more important jobs unrestricted and only available to men.[14] Thus, both unions and protective legislation for women, although seemingly beneficial, have contributed to wage discrimination.

Employers are a major contributor to discriminatory employment practices, but their practices only reflect the attitudes of society at large. American society has highly valued traits such as physical strength and aggression, traits that also just happen to be more common to the male gender. These societal attitudes are transferred through employers to wage determination scales to value the worth of an employer's positions. Women's work becomes undervalued because, although many of their jobs require high skill (such as nursing and teaching), they do not involve highly valued traits such as aggression and physical strength.

Conscious segregation may be an employer's practice as well as discriminatorily weighted wage determination scales. Although no longer permitted to indicate sexual preference in job advertising, employers tend to hire women for traditionally female positions. This same tendency works to a man's detriment should he seek employment in a female-dominated occupation.

The effect of all the aforementioned factors is that most men and women participate in separate labor markets. As has been demonstrated, these separate labor markets differ widely in wages paid. The wage differential

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[12] Mellow, *Employer Size, Unionism, and Wages* in RESEARCH IN LABOR ECONOMICS (JAI Press, forthcoming).

[13] For a discussion of the role of unions in protective legislation, see B. BABCOCK, A. FREEDMAN, E.H. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW 247-82 (1975).

[14] *See, e.g.*, Corning Glass Works v. Brennan, 417 U.S. 188 (1974).

between women and men is then perpetuated by the continuing use of these discriminatory wage determinations found in the marketplace. Employers use these market determinations of women's work to value their own company's jobs. For example, should a hospital administrator be faced with the task of establishing a salary for nurse's aides, he or she is likely to turn to valuations made by similar employers in the community or state. This seemingly "neutral" wage setting practice, when applied against a background of overtly discriminatory wage rates, perpetuates the wage differentials between women and men.

Should the employer need to determine the wage for a woman's position that is unique, he or she can no longer refer to the community determination. Instead, they may use their own subjective criteria to rate the value of that woman's job. The employer's assessment is colored by the value traditionally given female traits by society as well as by his or her personal beliefs. This discriminatory internal labor market will become a part of the already discriminatory external labor market when the employer reports its wage rates to various surveys.

The purpose of this paper is to demonstrate that reliance on these currently discriminatory market conditions in establishing employee salaries should not be a defense to a change of bias in a facially neutral wage setting system. Women in segregated jobs have been bringing suit under Title VII of the Civil Rights Act of 1964,[15] alleging that wage setting criteria may be facially neutral, but have an adverse impact on women as a group. Courts are being faced with the question of whether the employer may meet such charges with the defense that the labor market has permitted such a pay formulation. Employers deem market conditions to be a "factor other than sex"[16] isolating them from liability in wage discrimination suits. Considering the purpose of Title VII, along with the legislative history of this and other remedial legislation, courts should reject market conditions as a defense.

It is not the purpose of this paper to address in detail the comparable worth debate. Because consideration of comparable worth is a necessary prerequisite to the author's thesis, however, some discussion is required. Additionally, the establishment of a prima facie case alleging wage setting criteria to have an adverse impact on women differs under the facts of each case. Although addressed to a limited extent, the focus remains on the employer's defense to such a suit.

II. EQUAL PAY ACT

In the Equal Pay Act of 1963,[17] Congress attempted to narrow the wage

[15] 42 U.S.C. § 2000e (1976).
[16] 29 U.S.C. § 206(d)(1)(iv) (1976).
[17] *Id.* § 206(d).

differential between women and men by requiring equal pay for equal work. In order for a woman to be entitled to equal pay, however, she had to prove her job required equal skill, effort, and responsibility as that of a man's, as well as performing the job under similar working conditions.[18] The statute was intended to "eliminate sex as a basis for wage differentials between employees performing equal work on jobs within the establishment. . . ."[19] The Third Circuit Court of Appeals in *Shultz v. Wheaton Glass Co.*,[20] interpreted the remedial purposes of the Act.

> The Act was intended as a broad charter of women's rights in the economic field. It sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it.[21]

The economic and social consequences of disparate wages were considered to be both innately unfair and economically inefficient. In the "Declaration of Purpose" of the Equal Pay Act, Congress specified:

> The purpose of the Act as set out in the statute is:
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> Sec. 2. (a) The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex—
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> (1) depresses wages and living standards for employees necessary for their health and efficiency;
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> (2) prevents the maximum utilization of the available labor resources;
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> (3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce;
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> (4) burdens commerce and the free flow of goods in commerce; and
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> (5) constitutes an unfair method of competition.
>
> (b) It is hereby declared to be the policy of this Act, through exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct the conditions above referred to in such industries.[22]

Congress had a large goal in mind for such narrow legislation.

Three specific exceptions and one broad general exception to equal pay for equal work were prescribed in the Act. It was the intent of Congress that any wage differential resulting from a seniority system, merit system, or a system which measures earnings of quantity or quality of production was to

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[18] *Id.* § 206(d)(1).
[19] 29 C.F.R. § 800.114 (1967).
[20] 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970).
[21] 421 F.2d at 265.
[22] Pub. L. No. 88-38, 77 Stat. 56 (1963).

be exempted from the operation of the Act.[23] As Congress believed it impossible to list all possible exceptions, they also included the general exemption of a "factor other than sex".[24] If the pay differential could be explained on the basis of a factor other than sex, a valid defense to a charge of unequal pay for equal work was established.

To establish a prima facie case under the Equal Pay Act, the plaintiff carries the initial burden of proof to show that the employer pays workers of one sex more than workers of the opposite sex for equal work.[25] The employee must be prepared to demonstrate that her job is equal to that of a man's in skill, effort, and responsibility, and is performed under similar working conditions. The burden then shifts to the employer to show that the differential is justified under one of the Act's four exceptions. In its case-in-chief the employer carries the burden of proof as the Act's exceptions are considered to be affirmative defenses.[26]

A. *Market Conditions as a "Factor Other Than Sex" Under the Equal Pay Act*

As under Title VII, employers in Equal Pay Act suits have claimed market conditions to be a "factor other than sex." The case of *Corning Glass Works v. Brennan*[27] is most well-known for this defense. Corning Glass Works paid its night inspectors, who were all male, significantly higher wages than its day inspectors, who were all female and performed the same tasks. This pay differential was a result of the company's past discriminatory practices. In 1930, when Corning originally instituted a night shift, the state laws in Pennsylvania and New York prohibited women from working at night. Thus, only males could be hired as night inspectors. To encourage men to transfer from day shift jobs to night, substantially higher wages were offered for night work, even though the work was the same. Although the state laws prohibiting women from working at night were repealed earlier, Corning failed to open the night shift to women until 1966. The Equal Pay Act required such a move two years earlier, in 1964. In 1969 a new collective bargaining agreement attempted to bring the company in compliance with the Equal Pay Act. Although the agreement equalized the wages for all inspectors (day and night), the plan provided an exception. A "red circle" base rate was provided for all night inspectors hired prior to the date of the labor agreement in 1969. This "red circle" rate served to perpetuate the wage differential between women and men.

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[23] 29 U.S.C. § 206(d)(1)(i)-(iii) (1976).
[24] *Id.* § 206(d)(1)(iv).
[25] Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).
[26] *Id.* at 196.
[27] 417 U.S. 188 (1974).

Corning defended the charge by arguing that the higher base wage was merely intended to serve as added compensation for night work. Thus, Corning asserted that the differential was based on a "factor other than sex". Justice Marshall, writing for the majority, found this explanation unacceptable as other night work at Corning did not receive higher compensation. The Court found that higher wages were paid to night inspectors because of the need to compensate men for performing what were regarded as demeaning tasks. The Court held:

> The differential arose simply because men would not work at the low rates paid women inspectors, and it reflected a job market in which Corning could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work.[28]

Clearly, the Supreme Court has rejected market conditions as a "factor other than sex" when equal work is involved.

Under the Equal Pay Act, other courts have refused to recognize market conditions as a "factor other than sex". In *Hodgson v. Brookhaven General Hospital*,[29] the employer claimed that the wage differential between nurses aides (primarily women) and orderlies (primarily men) was necessary as its hospital could not recruit orderlies unless they paid them more than nurses aides. The Fifth Circuit held that the greater bargaining power enjoyed by employers with respect to women was not the kind of factor Congress had in mind.[30]

A wage differential between a male note teller and female note tellers was the subject of a suit brought by the Secretary of Labor in *Brennan v. Victoria Bank & Trust Co.*[31] The bank claimed that the wage differential was due to college and work experience as well as market conditions (what salary will the best applicant accept). The Secretary of Labor argued that the market force theory is not a valid consideration under the Equal Pay Act. The court agreed that women's willingness to work for less than men is not a valid consideration under the equal pay provisions of the Fair Labor Standards Act[32] and does not justify salary discrimination based on sex.[33]

In *Marshall v. Georgia Southwestern College*,[34] the Board of Regents conceded that the salaries for new teachers were determined by supply and de-

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[28] *Id.* at 205.
[29] 436 F.2d 719 (5th Cir. 1970).
[30] *Id.* at 726.
[31] 493 F.2d 896 (5th Cir. 1974).
[32] The Equal Pay Act is an amendment to the Fair Labor Standards Act of 1938.
[33] 493 F.2d at 899.
[34] 489 F. Supp. 1322 (M.D. Ga. 1980).

mand. Women professors were paid less as they were willing to work for less. The Board of Regents argued that they were not responsible for the realities of the open market and that it was a "factor other than sex". The court held otherwise. The majority reasoned the market force theory was not the kind of factor included within the catch-all exception, especially when it appeared that females have been willing to accept lower salaries than males.[35]

Courts considering Equal Pay Act claims are continuing to reject the market theory as a "factor other than sex". As recently as last year, the District Court of Texas did so in *Schulte v. Wilson Industries, Inc.*[36] Courts also refuse as defenses job differences that do not reflect a difference in economic value to a company,[37] and claims that women are more costly to employ than men.[38] Wage-setting attributable to sexual stereotyping has been rejected as a defense,[39] as have job classification systems designed to keep women in a subordinate role.[40]

B. *Limiting Nature of the Equal Pay Act*

Although market conditions have been rejected as a defense in Equal Pay Act claims, the narrow scope of the Equal Pay Act must be kept in mind. Only suits alleging equal work will be addressed by the courts. The Equal Pay Act does not address the problem of job segregation, and therefore does not provide a remedy for those women who are trapped in low paying, largely sex-segregated jobs. Wage differentials between workers doing dissimilar work cannot be compared under the Act.[41] In suits brought under the Act, consideration ends should dissimilar work be found between the men and women. Because of the limiting nature of the Act, courts are not able to address the reality of job segregation which leaves the Equal Pay Act providing a limited remedy applicable only to blatant discrimination.

III. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII of the Civil Rights Act of 1964, on the other hand, has the potential to have a far greater impact on wage discrimination. It was broadly drafted with the objective of eradicating employment discrimination in all its

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[35] *Id.* at 1330.

[36] 547 F. Supp. 324 (S.D. Tex. 1982).

[37] Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970); *but cf.* Hodgson v. Robert Hall Clothes, 473 F.2d 589 (3d Cir.), *cert. denied*, 414 U.S. 866 (1973) (difference in profitability as between men's and women's departments is an allowable defense).

[38] Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978).

[39] Hodgson v. Daisy Mfg. Co., 317 F. Supp. 538 (W.D. Ark. 1970), *aff'd in part, rev'd in part*, 445 F.2d 823 (8th Cir. 1971) (employer arbitrarily accorded greater weight to physical effort).

[40] Brennan v. Prince William Hosp., 503 F.2d 282 (4th Cir. 1974).

[41] "[I]t is clear that Congress did not intend to apply the equal pay standards to jobs substantially differing in their terms and conditions." 29 C.F.R. § 800.120 (1980).

forms. The Supreme Court in *Franks v. Bowman Transp. Co.*,[42] observed that,

> [I]n enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin, and ordained that its policy of outlawing such discrimination should have the highest priority. . . .[43]

The Act thus proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.[44] Because of this broad objective, Title VII should not be limited to sex-based wage discrimination claims that would be actionable under the Equal Pay Act. However, this is exactly what a number of courts in the past had done. This limitation seriously jeopardized the congressional intent that employment discrimination be eliminated. In 1972, in considering amendments to Title VII, Congress endorsed a broad interpretation of Title VII, indicating that discrimination had proven to be more pervasive, subtle and complex than had been anticipated in 1964.[45] The courts' justification for limiting Title VII to claims of equal work was the Bennett Amendment,[46] an addition to Title VII.

A. *Bennett Amendment*

In an attempt to harmonize the Equal Pay Act with Title VII, Senator Bennett proposed an amendment to Title VII. The text of the Bennett Amendment provides:

> It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the [Equal Pay Act].

Conflict soon arose over the meaning of the word "authorized" in the Amendment. On one side was the theory that only the four exceptions in the Equal Pay Act were incorporated into Title VII.[47] On the other side, it was argued that *all* of the Equal Pay Act was incorporated, including the equal work requirement.[48]

The hotly contested issue was decided with the Supreme Court's inter-

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[42] 424 U.S. 747 (1976).

[43] *Id.* at 763.

[44] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[45] Both the House and Senate Committee Reports Section-by-Section analysis of the Committee bills to amend Title VII cite the complex and subtle nature of discrimination. 118 CONG. REC. S3462 (daily ed. March 6, 1972); 118 CONG. REC. H1962 (daily ed. March 8, 1972).

[46] 42 U.S.C. § 2000e-2(h) (1970).

[47] *See, e.g.*, IUE v. Westinghouse Elec. Corp., 631 F.2d 1094 (3d Cir. 1980).

[48] *See, e.g.*, Lemons v. City and County of Denver, 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980).

pretation of the Bennett Amendment's effect in *County of Washington v. Gunther*.[49] Female prison guards brought suit under Title VII alleging they were paid unequal wages for work substantially equal to that performed by male guards, and in the alternative, that part of the pay differential was attributable to intentional sex discrimination. The district court dismissed respondents' charges after applying Equal Pay Act standards.[50] The court found that male guards supervised more prisoners and that female guards devoted much of their time to less valuable clerical duties. The majority therefore held that the respondents' jobs were not substantially equal to those of the male guards, and as such were not entitled to equal pay. The district court also dismissed respondents' claim of intentional sex discrimination holding that a sex-based wage discrimination claim cannot be brought under Title VII unless it would satisfy the equal work standard of the Equal Pay Act.

The court of appeals affirmed the district court as to the jobs of female guards not being substantially equal to that of male guards, but reversed the lower court on the issue of equal work being a prerequisite to suit under Title VII.[51] The question was then certified to the United States Supreme Court.

The Supreme Court undertook a review of the Bennett Amendment and its legislative history. Justice Brennan, writing for the majority, held that the word "authorize" in the Bennett Amendment referred only to the second part of the Equal Pay Act (in which the equal work requirement was not a part).[52] This meant that only the four employer defenses contained in the Equal Pay Act were to be included under Title VII. The majority held that a Title VII claim is not barred merely because claimants do not perform equal work to that of an employee of the opposite sex.[53] This holding was found to be consistent with the brief legislative history of the Bennett Amendment and the goals of Title VII.[54]

In considering *Gunther*, it is as important to recognize what the Court did *not* decide as it is to understand the majority's holding. Although holding that a suit need not allege equal work to be actionable under Title VII, no guidelines were provided for the theory and scope of such a cause of action. The elements necessary to make out a prima facie case of sex-based wage discrimination were left undecided.[55] The dissent characterized the majority's

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[49] 452 U.S. 161 (1981).
[50] 602 F.2d 882 (9th Cir. 1979), *reh'g denied*, 623 F.2d 1303 (9th Cir. 1980).
[51] *Id.*
[52] 452 U.S. at 171.
[53] *Id.* at 181.
[54] *Id.* at 171-80.
[55] *Id.* at 166, n.8.

decision as akin to a "restricted railroad ticket, 'good for this day and train only'."[56] Advocates of comparable worth claims were left with as little guidance after *Gunther* as they were before.

Additionally, because the respondents in *Gunther* alleged intentional discrimination on the part of their employer, and the Court was content to limit its holding to that question of intent, it is not known if a prima facie case under Title VII must demonstrate a discriminatory intent. If so, covert discriminatory acts would be difficult to prove. Employers relying on market conditions to establish wages then have a ticket to continue discriminatory practices.

B. *Comparable Worth Theory*

Although left undecided by the Supreme Court in *Gunther*, the issue of comparable worth is extremely important as it relates to Title VII protection.[57] Due to job segregation, where women and men do not perform the same work, employers are able to realize the benefits of discrimination without instituting an obviously unlawful wage structure or violating the Equal Pay Act. Specifically, employers are permitted to pay unequal wages for what is, in many cases, comparable work.

Title VII's scope should be enlarged to allow the majority of women employed in segregated jobs to attack wage discrimination. This is not a possibility unless courts begin to consider comparable work in the establishment of a prima facie case under Title VII. Courts should be mindful that, by not considering the realities of job segregation, they may very well be providing women with less of a remedy under Title VII than is available to blacks or other protected classes.[58] The courts' concern for avoiding a new and complex type of Title VII suits should not stand in the way of a working woman's right to comparable pay.

C. *Wage Discrimination Claims Under Title VII*

Two types of claims alleging wage discrimination may be brought under Title VII. The first is a disparate treatment case where an individual woman or class of women seek equal treatment with that of men as regards wages. An Equal Pay Act analysis is applied to these cases since they involve equal

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[56] *Id.* at 183 (Rehnquist, J., dissenting).

[57] *See, e.g.*, Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J. L. REF. 397 (1979); Nelson, Opton & Wilson, *Wage Discrimination & the "Comparable Worth" Theory in Perspective*, 13 U. MICH. J. L. REF. 231 (1980).

[58] *IUE*, 631 F.2d at 1100. It might be argued that providing women with less of a remedy under Title VII than other protected classes was the purpose of the Bennett Amendment. However, it would seem both unreasonable and unfair to require a clearer congressional intent of equal opportunity for women than is required for other Title VII protected classes.

work. The plaintiff must ultimately prove intentional discrimination on the part of her employer.

A disparate treatment claim is not a likely possibility for the majority of women who suffer from covert discrimination due to job segregation and the employer's use of market conditions to establish wages. Only if the definition of "intent" were given a more expansive construction could a disparate treatment case become a possibility for these women. The definition of "intent" would need to include those acts that are prompted by subconscious beliefs regarding the value of women's work. Otherwise, the proper avenue would be a disparate impact case. In such a suit, a class of women seek equal opportunity between men and women in employment. No showing of intentional discrimination is necessary for women to challenge the use of the market to determine their wages.[59]

Title VII can be the proper avenue for a disparate impact suit, as was articulated by Chief Justice Burger in *Griggs v. Duke Power Co.*[60] In speaking of the objective of Congress in enacting Title VII, he wrote:

> It was to achieve equality of employment opportunities and move barriers that have operated in the past to favor an identifiable group of . . . employees over other employees. Under the Act, practices, procedures, or tests *neutral on their face, and even neutral in terms of intent*, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.[61]

Nothing in the *Gunther* opinion indicates that this analysis is not applicable to claims of discrimination in wage rates.

D. *Title VII Disparate Impact Claims*

There are two basic types of disparate impact cases claiming wage discrimination. The "pure" form of disparate impact is where women bring suit not challenging the wage itself, but challenging the criteria which determine the wage. These criteria depend on characteristics peculiar to a particular group of employees. An example of such a suit is found in *Kouba v. Allstate Ins. Co.*[62] In this case, the plaintiff alleged the company's method of establishing the "monthly minimum" for new sales agents/trainees discriminated against women. The "monthly minimum" represented the actual salary paid to all new sales agents during the first three months of their employment by Allstate while they were trained for their new positions. This "monthly minimum" was to be set commensurate with the individual's abili-

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[59] *Griggs*, 401 U.S. at 430.

[60] *Id.* at 424.

[61] *Id.* at 430 (emphasis added).

[62] 523 F. Supp. 148 (E.D. Cal. 1981), *rev'd*, 30 EMPL. PRAC. DEC. (CCH) ¶ 33,123 (9th Cir. 1982).

ty, experience, education and current salary situation. "Current salary situation" meant the salary the applicant received in the employment immediately preceding hire by Allstate. Although facially neutral, the plaintiff claimed the result of the system was to pay women less than men. She presented statistical evidence to show that the differences between male agents' mean (average) and female agents was about seven standard deviations.[63] Use of an individual's prior salary perpetuated the use of poor wages traditionally given to women. The district court accepted plaintiff's statistical evidence as proof of a prima facie case.[64]

In the second type of disparate impact case the plaintiff alleges bias in a facially neutral wage evaluation system due to job segregation. Here the wage is directly challenged. The bias creating the depressed wage may be a result of internal establishment prejudice, external establishment prejudice, or a combination of both. With internal establishment bias the employer fixes wages by observing a job and ranking it in relation to other jobs.[65] The problem with this practice is that the employer may allow biased personal preference, about current employees and the job itself, to weigh the determination.[66] In particular, the employer may give more value (and thus higher rates) to male traits and skills. This ranking method is often employed where jobs are unique, thereby preventing the use of previously established wages in the market. Such was the case in *Heagney v. University of Washington*[67] where the plaintiff was employed in the nuclear physics lab (NPL) to design and fabricate targets used in nuclear physics experiments. Her salary was established by a supervisory committee of the NPL because her job was one with unique requirements. The plaintiff in *Heagney*, like the plaintiff in *Kouba*, used statistics to prove that as a group, women exempt employees at the University received disproportionately lower salaries than men. However, because the gravamen of the plaintiff's case was that the lack of well-defined employment criteria allowed a pattern or practice of discrimination to exist, the court concluded that a disparate treatment case was the proper avenue for her claim rather than a disparate impact case.[68] This holding is questionable since the plaintiff was not alleging intentional discrimination on the part of the University. It must be recognized that bias regarding the value of women's work is often not intentionally interjected by the employer. It is interposed as a result of conditioning and societal attitudes, something the courts surely should not expect a plaintiff to prove.

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[63] Deviations become significant when greater than two or three standard deviations. Casteneda v. Partida, 430 U.S. 482 (1977).

[64] 523 F. Supp. at 159.

[65] R. SIBSON, COMPENSATION: A COMPLETE REVISION OF "WAGES AND SALARIES" 38-39 (1974).,

[66] *Id.*

[67] 642 F.2d 1157 (9th Cir. 1981).

[68] *Id.* at 1163.

Bias in a facially neutral wage evaluation system may also be the result of external establishment bias. This occurs when an employer uses the supply and demand of the market or community wage rates to dictate the worth of jobs within the establishment. Given statistics showing the concentration of women within a few occupations and the overall undervaluation of women's work,[69] the result of using market conditions to establish wages will be perpetuation of wage discrimination.[70] It is in these types of cases that the employer most often relies on the market conditions to be a "factor other than sex," insulating him from liability.

In 1977 the Eighth Circuit Court of Appeals had the occasion to decide this type of disparate impact suit. In *Christensen v. State of Iowa*,[71] female clerical workers at the University of Northern Iowa (UNI) brought suit alleging wage discrimination toward women was present at UNI. Prior to 1974, the University determined the wage scales for nonprofessional jobs by reference to wages paid for similar work in the local labor market. Although all jobs at UNI were open to persons of both sexes, the nonprofessional jobs tended to be segregated by sex.[72] The labor market in the surrounding community was similarly segregated. As a result, UNI's pay system perpetuated the traditional disparity between the wages paid to women and those paid to men. Although the University initially used an objective method to determine the worth of nonprofessional jobs,[73] wages were actually determined when the point worth of a job was compared to similar jobs in the market. Because the local job market paid higher wages for physical plant jobs than the beginning pay under the employer's system, UNI modified the system to give advanced pay for many of the physical plant workers but not clerical employees. Although the plaintiffs were able to establish a prima facie case of disparate impact, the court found for the University as UNI permitted women to work in physical plant jobs as well as men.[74]

Regardless of the type of disparate impact case alleging wage discrimination brought under Title VII, the establishment of a prima facie case remains basically the same. A plaintiff bringing a disparate impact claim must establish that (1) she or he is a member of a protected class; (2) a given employment practice "operates to disqualify [member of plaintiff's] class at a

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[69] *See supra* notes 1-7 and accompanying text.

[70] R. SIBSON, *supra* note 65, at 44.

[71] 563 F.2d 353 (8th Cir. 1977). *See also* Lemons v. City and County of Denver, 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980); Briggs v. City of Madison, 536 F. Supp. 435 (W.D. Wis. 1982).

[72] All the employees in UNI's clerical department were women and the great majority of the employees in its physical plant were men.

[73] UNI used the Hayes System under which compensation was to be based on an objective evaluation of each job's relative worth to the employer regardless of the market price.

[74] 563 F.2d at 357.

substantially higher rate" than other employees; and (3) plaintiff was denied an employment opportunity due to this practice.[75] The claim is not premised on the discriminatory application of an employment practice, but on the fact that the practice itself, neutral on its face and impartially applied, has adverse consequences for members of a particular group.[76]

Evidence that an employer's wage-setting system has had an adverse impact on women employees can be developed and presented through statistics.[77] One commentator has suggested that a simple showing of sex-segregated jobs in the workplace will establish a prima facie case of disparate impact.[78] However, it is more likely that a court will require an additional showing of disparate compensation between traditionally "women's" and "men's" jobs. Multiple regression analysis, a statistical device for making precise and quantitative estimates of the effects of different factors on some variable of interest, can be used to identify disparities in compensation that cannot be accounted for by differences in the training, effort or responsibility required by the jobs themselves.[79] This statistical proof, based on an adequate sample and showing a substantial adverse impact, provides the nexus to raise an inference of discrimination.[80]

After establishing a prima facie case the plaintiff may also wish to present evidence of less discriminatory alternatives. Use of a comparable worth value or more objective standards in determining employee wages could replace the employer's reliance on community wage rates and subjective criteria. One alternative method of determining wages, which has been noted for its objectivity, is the Hayes system,[81] used by the University of Northern Iowa (UNI) in *Christensen*. This pay scheme contemplates compensation being based on an objective evaluation of each job's relative worth to the employer regardless of the community wage rate or supply and demand. With UNI, the Hayes system evaluated all jobs in terms of thirty-eight factors and assigned points for each factor. Jobs with similar points were placed in the same labor grade, regardless of the actual content of the job. Use by employers of this scheme should theoretically eliminate the undervaluation of "women's" work.

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[75] *Griggs*, 401 U.S. at 426.

[76] International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

[77] Use of statistics in the establishment of a prima facie case is discussed more fully in Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal*, 89 HARV. L. REV. 387 (1975).

[78] Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J. L. REF. 397, 459 (1979).

[79] For a thorough discussion of the use of multiple regression analysis in wage discrimination suits, see D. BARNES, STATISTICS AS PROOF (1983); Fisher, *Multiple Regression in Legal Proceedings*, 80 COLUM. L. REV. 702 (1980).

[80] *See Teamsters*, 431 U.S. at 339.

[81] *See Christensen*, 563 F.2d at 354.

The burden then shifts to the employer to defend his employment practices. The focus of this paper is limited to the employer's defense that the wage differentials between women and men are based on a "factor other than sex." Specifically, the question is whether the employer's use of market conditions to determine in-house wages constitutes a "factor other than sex." Because all of the defenses under 29 U.S.C. § 206(d) are considered to be affirmative defenses,[82] the employer carries the burden of proof.

E. *The Employer's Defense*

The employer can argue that his company's wages actually are determined by the "free" market on the basis of the neutral forces of the supply of qualified workers and the demand for their skills. Another defensive rationale is that employee wages are determined by the community wage rate. The arguments are closely linked.

The problems with these arguments are many. First, according to Department of Labor guidelines, the requirements for a "factor other than sex" are not met unless "the factor of sex provides no part of the basis for the wage differential."[83] As shall be explained, use of market conditions to determine wages most definitely encompasses the sex of the employee as a factor in setting wages.

The employer's argument that women's wages are determined by the theory of supply and demand lacks understanding of the assumptions present in that theory. Some of the premises of the supply and demand theory are that workers have full knowledge of the market and that the worker makes his or her own decisions as to wages and jobs performed.[84] The theory also assumes that employers act individually and not in concert when participating in the labor market.[85]

In reality, the individual woman is not in an equal position to bargain due to ignorance about wage rates and the undervaluation of women's work, the latter resulting from the concerted, though at times unintentional, actions of employers and unions. In essence, too many false assumptions are required for the theory to work. Use of the supply and demand theory places blame on the individual woman worker who bargained poorly and found herself underpaid. It should also be noted that some employers cannot rely on the supply and demand theory to explain the undervaluation of "women's" jobs. In certain professions, such as nursing, although the market demand is high and the supply low, wages remain depressed.

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[82] *Corning Glass*, 417 U.S. at 196.

[83] 29 C.F.R. § 800.142 (1980).

[84] F. MARSHALL, A. KING & V. BRIGGS, JR., LABOR ECONOMICS 177 (1980).

[85] *Id.* at 178.

The method of setting wages by community standards is more involved than an employer would have the courts believe. There are two different occasions for bias to enter this facially neutral practice. In preparation for comparison with the community market an employer ranks positions according to their functional worth.[86] It is at this stage that an employer can interject his own bias regarding the worth of "women's" work. These ranked jobs are then compared to similar jobs in similar industries within the community.[87] This comparable, external market is significant as a mirror of discriminatory wage practices which are simply perpetuated when an employer makes use of them.

Empirical evidence suggests the existence of sex-based wage discrimination in the marketplace.[88] Additionally, the supply and demand theory embodies too many false assumptions to be applied to the realities of women in the work force.[89] Despite these facts employers continue to rely on market conditions as a "factor other than sex" and more often than not the defense is accepted by the courts.

F. *Market Conditions as a "Factor Other Than Sex" in Title VII Disparate Impact Cases*

Several courts have accepted market conditions as a "factor other than sex" when raised by the employer in a Title VII disparate impact claim. The Eighth Circuit Court of Appeals was the first to do so in *Christensen v. State of Iowa*.[90] In response to the plaintiff's allegation of sexually discriminatory wages,[91] the Board of Regents defended on the basis that the market rate justified their paying physical plant employees more than clerical workers.[92] When the plaintiffs attempted to explain to the court that use of the market rate served only to perpetuate wage discrimination, the court responded:

> We find nothing in the text and history of Title VII suggesting that Congress intended to abrogate the laws of supply and demand or other economic principles that determine wage rates for various kinds of work. We do not interpret Title VII as requiring an employer to ignore the market in setting wage rates for genuinely different work classifications.[93]

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[86] N. CHAMBERLAIN & D. CULLEN, THE LABOR SECTOR 296 (1971).

[87] *Id.*

[88] *See* Committee on Occupational Classification and Analysis, Assembly of Behavioral and Social Sciences, National Research Council, National Academy of Sciences, WOMEN, WORK, AND WAGES: EQUAL PAY FOR JOBS OF EQUAL VALUE, 42, 44-68 (D. Treiman & H. Hartmann, eds. 1981) [hereinafter cited as WOMEN, WORK & WAGES].

[89] N. Chamberlain, *supra* note 86, at 371.

[90] 563 F.2d 353 (8th Cir. 1977).

[91] *See supra* text accompanying notes 71-74.

[92] 563 F.2d at 355.

[93] *Id.* at 356.

Because the court did not want to entertain a theory of comparable worth, the challenged wage setting practices were permitted to stand.

In *Lemons v. City of Denver*,[94] city nurses claimed that despite a pay parity with nurses in the community, they were undercompensated in violation of Title VII. Plaintiffs argued that nurses have historically been underpaid because the occupation is predominantly a female one. Plaintiffs asked the court to compare their worth to that of city employees in nonnursing positions. The plaintiffs alleged that comparison of their jobs with other nursing jobs in the community in order to establish wages perpetuated the historical undervaluation of their work. Although the court recognized that "[t]he relationship of pay for nurses to pay for other positions is obviously a product of past attitudes, practices, and perhaps of supply and demand,"[95] it declined to accept plaintiffs' comparable worth argument. The reasoning of the court was that "this would be a whole new world for the court," and lacking clear congressional directive, the courts "cannot venture into it."[96] Once again, lack of equal work stood in the way of fulfillment of Title VII's purpose of eradicating employment discrimination in all its forms.

Market conditions have continued to be accepted as a "factor other than sex" by courts as recently as 1982. In *Briggs v. City of Madison*,[97] public health nurses (primarily women) brought suit claiming that although they performed work equal to or greater than public health sanitarians (all men), the nurses were paid less. The City argued that due to market conditions, public health sanitarian positions required higher pay as they were difficult to recruit and maintain. Although use of market conditions perpetuated the biases and prejudices regarding "women's" work, the court held:

> Under Title VII, an employer's liability extends only to its own acts of discrimination. Nothing in the Act indicates that the employer's liability extends to conditions of the marketplace which it did not create. Nothing indicates that it is improper for an employer to pay the wage rates necessary to compete in the marketplace for qualified job applicants. That there may be an abundance of applicants qualified for some jobs and a dearth of skilled applicants for other jobs is not a condition for which a particular employer bears responsibility.[98]

Proponents of discarding market conditions as a defense to wage differentials were encouraged by the federal district court's opinion in *Kouba v. Allstate Ins. Co.*[99] In that case, the plaintiff challenged Allstate's use of an

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[94] 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980).

[95] *Id.* at 228.

[96] *Id.* at 229.

[97] 536 F. Supp. 435 (W.D. Wis. 1982).

[98] *Id.* at 447.

[99] 523 F. Supp. 148 (E.D. Cal. 1981), *rev'd* 30 EMPL. PRAC. DEC. (CCH) ¶ 33,123 (9th Cir. 1982).

employee's prior salary with the preceding employer to establish a new salary at Allstate.[100] The defendant claimed use of prior salary was a "factor other than sex." Because the plaintiff was performing work equal to those of male sales agents, both Title VII and the Equal Pay Act applied to her charge. The court interpreted the employer defenses under the two statutes to be the same, even though plaintiff's suit was one of disparate impact rather than disparate treatment.

In addressing the use of prior salaries as a "factor other than sex" and whether this perpetuated past discriminatory practices, the lower court held:

> [A]n employer may not set a salary schedule which differentiates between its male and female employees doing the exact same job, based upon the immediate past salaries paid to the men and women, *unless it can demonstrate that it has assessed the previous salaries and determined that they themselves were set on "other factors other than sex."* In the absence of the proffering of such evidence, as a matter of law because of the "endemic problem" of sex discrimination, the practice does not equate with "any other factor other than sex" and thus is not an affirmative defense sufficient to defeat plaintiff's demonstration. . . .[101]

Unfortunately, this powerful language and interpretation was reversed on appeal.[102] In interpreting the meaning of a "factor other than sex" the court of appeals rejected the district court's holding that "the employer must demonstrate that it made a reasonable attempt to satisfy itself that the factor causing the wage differential was not the product of sex discrimination."[103] Instead, the court of appeals required that the employer have an acceptable business reason for using a factor which causes a wage differential.[104] The court, citing *Corning Glass*,[105] made note that not every reason making economic sense would be acceptable. However, the court declined to compile a list of unacceptable factors. It did state that in an attempt to avoid pretextual business objectives the employer must use the factor reasonably in light of its stated purpose as well as its other practices.[106]

Despite the reversal of the lower court's reasoning, *Kouba* has narrowed somewhat the employer's reliance on market conditions as a "factor other than sex." In its opinion the court made it clear that the employer bears the burden of showing the wage differential results from a "factor other than sex."[107] This means that the employer must prove and not merely articulate

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[100] *See supra* text accompanying notes 62-64.
[101] 523 F. Supp. at 162 (emphasis added) (citations omitted).
[102] 30 EMPL. PRAC. DEC. (CCH) ¶ 33,123 (9th Cir. 1982).
[103] 523 F. Supp. at 162.
[104] 30 EMPL. PRAC. DEC. (CCH) ¶ 33,123, at 27,454.
[105] *Id.* at 27,456 n.6.
[106] 30 EMPL. PRAC. DEC. (CCH) ¶ 33,123, at 27,454.
[107] *Id.* at 27,453.

an acceptable reason for using a factor which causes a wage differential. Thus, the court came very close to requiring a business necessity for the use of factors causing wage differentials.

Given the requirements established by the majority in *Kouba*, which relied upon *Corning Glass*,[108] cases such as *Christensen* and *Lemon* might be decided differently today. Situations similar to that of *Corning Glass* where the employer paid female inspectors less than male inspectors because the market allowed the differential, should be struck down. Thus, in *Christensen*, the fact that UNI could pay clerical workers less than physical plant workers might not stand as an acceptable business reason. Likewise, the employer in *Lemon* might not have been permitted to perpetuate the low community wage for nurses. However, as in *Briggs*, should a court be convinced difficult recruiting necessitates an inflated wage for certain predominantly male positions, the *Kouba* analysis may make no difference. The importance of *Kouba* is that requirements for a "factor other than sex" defense have been established, clearing the way for subsequent courts to take further steps to eliminate the perpetuation of discriminatory wage differentials.

Given that both Title VII and the Equal Pay Act serve the same fundamental purpose against discrimination based on sex,[109] it is difficult to appreciate the different analyses given the defense of market conditions when presented under the two Acts. Cases brought under the Equal Pay Act and met with the market conditions defense prevail as the market force theory is not considered to be a "factor other than sex."[110] On the other hand, Title VII claims met with the same defense fall as "[n]othing in the Act indicates that the employer's liability extends to conditions of the marketplace which it did not create."[111] Due to the fact that Title VII is a broader statute than the Equal Pay Act, the reverse should be true.

If the difference in analyses is due to the Court's reluctance to accept comparable work instead of equal work, it should be remembered that both the Equal Pay Act and Title VII were directed to the discriminatory *consequences* of an employer's practices. Whether the claim brought is one of disparate treatment under the Equal Pay Act, or disparate impact brought under Title VII, the *effect* is the same. As Justice Stevens pointed out in *Washington v. Davis*,[112] an equal protection case, "[t]he line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might

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[108] *Id.* at 27,456 n.6.

[109] Shultz v. Wheaton Glass Co., 421 F.2d 259, 266 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970).

[110] *See, e.g.*, Corning Glass Works v. Brennan, 417 U.S. 188 (1974); Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719 (5th Cir. 1970).

[111] 536 F. Supp. at 447.

[112] 426 U.S. 229 (1975).

assume."[113] Similarly, the line between blatant sex discrimination and less detectable discriminatory employment practices is not so bright. It is the overall effect that should be conclusive as Congress directed the thrust of Title VII to the "consequences of employment practices. . . ."[114]

Strength may be added to this argument by the Supreme Court's opinion in *Gunther*. The Court's view that the Bennett Amendment incorporates the Equal Pay Act defenses into Title VII envisioned a consistent interpretation by courts and administrative agencies of the first three defenses.[115] Otherwise, inconsistent bodies of case law might arise concerning two sets of nearly identical language.[116] This same danger is present when courts are permitted to differ in their analyses of market conditions as a "factor other than sex," the fourth defense. The defense is identical whether presented in an Equal Pay Act case or a Title VII disparate impact case.

G. *Ojections to Rejecting Market Conditions as a "Factor Other Than Sex"*

More than the fear of the unknown regarding comparable worth may be limiting the courts in Title VII disparate impact cases. American business interests are sure to point out the economic and institutional consequences of striking down market conditions as a "factor other than sex." Some of the objections already voiced include a prediction of rippling pay inflation.[117] This would result, it is argued, if an employer is required to raise his wages to a comparable worth standard. In order to keep their employees content, other nearby employers would also have to raise wages. Additionally, unions would be pressured by their members for a corresponding increase. Another objection is that employers would experience a severe monetary burden if required to set wages in disregard of the market.[118]

Other institutional consequences arising from the rejection of market conditions as an employer defense have been predicted. These include an insurmountable burden of proof being placed on employers,[119] and innocent employers being required to pay for a situation they did not create.[120] It has also been argued that the judiciary hasn't the authority to interfere with the laws of supply and demand.[121] Perhaps the strongest objection is that the

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[113] *Id.* at 254 (Stevens, J., concurring).

[114] *Griggs*, 401 U.S. at 432.

[115] 452 U.S. at 170.

[116] *Id.*

[117] *See Equality of Opportunity: The Emerging Challenge in Employment*, Conf. Bd. of Can. (No. 4 1978).

[118] *See generally* Nelson, Opton & Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. MICH. J. L. REF. 233 (1980).

[119] *Id.* at 280.

[120] *Briggs*, 536 F. Supp. at 447.

[121] Nelson, Opton & Wilson, *supra* note 118, at 292.

cases proposing comparable worth combined with a market-conditions defense involve theories too complex for the courts.[122]

Objections relating to the cost of remedying sex-based wage discrimination are often misplaced. Title VII's primary objective is the achievement of equitable, not economically efficient, employment practices. In enacting Title VII, Congress in no way authorized the courts to balance the cost of eliminating wage discrimination against its benefits. Nothing in the legislative history of Title VII indicates that Congress placed a price tag on the cost of correcting discrimination in employment. Arguments relating to costs should have been made prior to the enactment of Title VII, not after. Even if Title VII was concerned with economic efficiency, it embodies an assumption that inequitable employment practices impair the operation of the labor market, in that such practices are ultimately inefficient.[123] A market concerned with traits unrelated to job capacity (such as sex) is not performing at its fullest capacity.

No insurmountable burden of proof is being placed on employers using market conditions as a defense to a disparate impact claim. As was explained in *Kouba*, employers need only prove an acceptable business reason for using a factor which causes a wage differential.[124] It might be that the need to recruit, as in *Briggs*, would provide an acceptable business reason. This hardly places an insurmountable burden on the defense. Any burden relating to use of a comparable worth standard instead of subjective criteria in valuing jobs is also negligible when compared with the costs of employment discrimination. Employers make assessments regarding the worth of different jobs every day. All Title VII requires is that employers explain such assessments of job value, and the decisions that are based on them, on grounds that are sex neutral.

The idea of innocent employers being required to pay a price for a crime they did not commit is an emotional response to the law. Title VII applies to *all* employers as a prescriptive act. It requires employers to guarantee that discriminatory employment practices in this society will be corrected. Although Title VII is applicable to all employers, only those employers using market conditions to perpetuate discriminatory wage differentials between women and men will feel the impact of its prescriptions. It should be made clear that the use of market conditions to establish wages is not an innately bad practice. Only when those market conditions fail to reflect the true value of the job should their use be prohibited.

Judicial interference with the law of supply and demand is justified when

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[122] *Id.*

[123] *See* S. Rep. No. 867, 88th Cong., 2nd Sess. 2 (1964).

[124] 30 EMPL. PRAC. DEC. (CCH) ¶ 33,123, at 27,454.

discrimination is present. The market is not an impersonal absolute; it is simply a reflection of behavior and attitudes. Employer behavior and attitudes is exactly what Congress intended to alter in enacting Title VII.

Determination of wage-setting systems by the courts may very well lead to complex cases being brought before unprepared adjudicators. However, concern about the complexity of lawsuits does not lead to the conclusion that the legislature is the proper forum rather than the judiciary. Congress' role should be limited to making an initial policy determination regarding the need to eliminate wage differentials between women and men. This they have done with the enactment of Title VII. It is the courts' role to eliminate discriminatory wage practices in individual cases.

The issues relating to job evaluation only require the courts' careful scrutiny. In suits alleging market conditions as a defense to wage differentials, courts should require precise definitions of the compensable factors used by the employer and give greater weight to evaluations prepared by multiple evaluators, as participation of several persons improves reliability.[125] The factors chosen, including comparison to the community wage rate, should then be validated to overcome discriminatory effects.[126] Finally, courts must make sure that the factors chosen by the employer are used reasonably in light of their stated business purpose.[127] The burden of producing and explaining job evaluations and validation studies rests on the parties, not the court. Thus, manageability of the issues involved in Title VII wage discrimination suits can be aptly handled by the judiciary.

In exceptionally difficult cases, the supervision and interpretation of evidence presented might be given to special masters, appointed for the case. The Federal Rules of Civil Procedure permit the appointment of a special master in cases that are especially burdensome or require unique experience.[128] With the use of patience and experts, courts need not let practical concerns inhibit inquiry into a pervasive problem of discrimination which is within the scope of Title VII.

IV. CONCLUSION

Realizing the full potential of Title VII protection against wage discrimination should be the aim of the courts in the 1980's. The court of appeals in *Kouba* has taken the first step in giving a solid interpretation of a "factor other than sex" as it relates to wage discrimination litigation. It is hoped that subsequent courts will further limit an employer's use of dis-

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[125] WOMEN, WORK & WAGES, *supra* note 88, at 43.
[126] *Id.*
[127] *Kouba*, 30 EMPL. PRAC. DEC. (CCH) ¶ 33,123 at 27,454.
[128] FED. R. CIV. P. 53(b).

criminatory factors to determine wages, especially given the state of the American economy. Women are now joining the labor force out of economic necessity,[129] not simply to earn pin money.[130] To avoid poverty level subsistence,[131] the wage gap between women and men must be examined and narrowed. Rejecting market conditions as a "factor other than sex" could only help reach this goal.

[129] Women are maintaining an increasing proportion of all families; about 1 out of 6 (sixteen percent) families was maintained by a woman in March 1982, compared with more than 1 out of 8 (twelve percent) in 1972. FACTS ON WOMEN WORKERS, *supra* note 2, at 3.

[130] The pin-money hypothesis assumed that women workers were well-supported and sought a paying job only as a means of securing extra cash to indulge frivolous feminine desires.

[131] Women represented sixty-three percent of all persons below the poverty level who were sixteen years of age and over in 1981. FACTS ON WOMEN WORKERS, *supra* note 2, at 3.